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NO.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HENRY E. INGRAM, JR.

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES
FOURTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

I

Whether the defense of legal impossibility can be abrogated by the courts when Congress has not yet provided the elimination of this defense for the statute which the accused is charged with violating?

II

Whether there was sufficient evidence presented to sustain a conviction of conspiracy to violate the Hobbs Act when there was no interstate commerce affected and no probable effect on interstate commerce?

III

Whether a defendant has the right to be tried by a jury composed of a cross section of citizens within the division where the crime is alleged to have occurred rather than by a jury drawn from a statewide jury box?

IV

Whether an entrapment charge should have been submitted to the jury?

Note: Clifford Brantley is the only other party involved in this case who is not listed in the caption.

TO THE HONORABLE WARREN E. BURGER,
CHIEF JUSTICE, AND ASSOCIATE JUSTICES
OF THE SUPREME COURT OF
THE UNITED STATES

Henry E. Ingram, Jr., the Petitioner herein, prays that a Writ of Certiorari issue to review the decision and judgment of the United States court of appeals for the Fourth Circuit entered in the above entitled case on November 7, 1985.

TABLE OF CONTENTS

Page

Questions Presented 1

Table of Contents i

Table of Authorities ii

Opinions Below 4

Jurisdiction 4

Statutes and Constitutional Provisions Involved 5

Statement of Case 11

Reasons for Granting Writ 14

Conclusion 37

Appendix 39

TABLE OF AUTHORITIES

Booth v. State, 398 P. 2d 863 (Okl. Cr. App. 1964)..... 15
Brown v. Allen, 344 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397 (1953).. 31
Carter v. Greene County, 396 U.S. 320, 24 L.Ed.2d 549, 90 S.Ct. 518 (1970)..... 31
Dupoint v. United States, 388 F.2d 39 (5th Cir. 1968)..... 29
Duren v. Missouri, 439 U.S. 357, 58 L.Ed.2d 579, 99 S.Ct. 664 (1974)..... 31
Hampton v. United States, 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1648 (1976)..... 34
Ladner v. United States, 168 F.2d 771 (5th Cir. 1948)..... 51
Model Penal Code, Tentative Draft No. 10 (1960)..... 15, 16, 17, 21, 54
Osborn v. United States, 385 U.S. 323, 17 L.Ed. 2d 394, 87 S.Ct. 429 (1966)..... 14
People v. Rollino, 37 Misc. 2d 14 233 N.Y.S. 2d 580 (1962)..... 15

Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163 (1972)... 31
Rewis v. United States, 401 U.S. 808 (1971)..... 45,55
Section 2, Title 18, U.S.C..... 8
Section 1254(1), Title 28 U.S.C..... 4,5
Section 1861, Title 28, U.S.C..... 28,29
Section 1951, Title 18, U.S.C. 5,11,12,16,45,50,54,56
Section 1951(a), Title 28, U.S.C.A... 51
Section 1952, Title 18, U.S.C.A..... 49
Section 371, Title 18, U.S.C..... 7
Sherman v. United States, 356 U.S. 369, 2 L.Ed.2d 848, 78 S.Ct. 819 (1958)..... 33
Smith v. Texas, 311 U.S. 128, 5 L.Ed. 84, S.Ct. 164 (1940)..... 31
Sorrells v. United States, 287 U.S. 435, 77 L.Ed. 413, 53 S.Ct. 210 (1932)..... 32,35
Taylor v. Louisiana, 419 U.S. 522, 42 L. Ed. 2d 690, 95 S.Ct. 692 (1975)..... 31
United States Constitution, Fifth Amendment..... 9
United States Constitution, Sixth Amendment..... 9,28,30

United States Constitution, Fourteenth Amendment..... 10
United States v. Archer, 486 F.2d 670 (2nd Cir. 1973)..... 49
United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981)..... 17
United States v. Berrigan, 482 F.2d 171 (3rd Cir. 1973)..... 19
United States v. Brooklier, 459 F.Supp. 476 (C.D. Cal. 1978)..... 17,52,53,54
United States v. Darnell, 545 F.2d 595 (8th Cir. 1976)..... 15,22
United States v. Duz-Mor Diagnostic Laboratory, Inc., 650 F. 2d 223 (9th Cir., 1982)..... 18
United States v. Everett, 692 F. 2d 596 (9th Cir. 1982)..... 18
United States v. Feola, 420 U.S. 671, 43 L.Ed.2d 541, 95 S.Ct. 1255 (1975)..... 25,26
United States v. Fernandez, 480 F.2d 726 (2nd Cir. 1973)..... 30
United States v. Frazier, 560 F.2d 884 (8th Cir. 1977)..... 22
United States v. George Everett, 700 F.2d 900 (3rd Cir. 1983)..... 20

United States v. Gambino, 566 F.2d 414 (2nd Cir. 1977)..... 50
United States v. Hair, 356 F.Supp. 339 (D.D.C. 1978)..... 15,19
United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y., 1973).. 21
United States v. Holmes, 767 F.2d 820 (11th Cir. 1985)..... 23
United States v. Hunter, 478 F.2d 1019 (5th Cir. 1973)..... 19
United States v. Jannotti, 673 F.2d 578 (3rd Cir. 1982)..... 19,36,52
United States v. Marin, 513 F.2d 974 (2nd Cir. 1974)..... 21
United States v. Mattson, 671 F.2d 1020 (7th Cir. 1982)..... 20,21,25
United States v. Ovideo, 525 F.2d 881 (5th Cir. 1976)..... 18
United States v. Perl, 584 F.2d 1316 (4th Cir. 1978)..... 32,35
United States v. Russell, 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637 (1973)..... 33
United States v. Santoni, 585 F.2d 667 (4th Cir. 1978)..... 46,47
United States v. Spagnolo, 546 F.2d 1117 (4th Cir. 1976)..... 46,47

United States v. Staszcuk, 517 F.29 53 (7th Cir. 1975)... 27,47,48,53
United States v. Stanford, 547 F.2d 1085 (9th Cir. 1976)..... 17
United States v. Truglio, 731 F.2d 1123 (4th Cir. 1984)..... 30
United States v. Waldron, 590 F.2d 33 (1st Cir. 1979)..... 21
Ventimiglia v. United States, 242 F.29 620 (4th Cir., 1957)..... 16
Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. 1, 360 (1970).. 16

OPINIONS BELOW

The published opinion of the fourth circuit court of appeals decided November 7, 1985, is reproduced in Appendix at page 39, and the order denying petitioner's petition for rehearing filed April 2, 1986, is reproduced in Appendix at page 58.

JURISDICTION

The fourth circuit's order affirming in part and reversing in part petitioner's convictions in the district court was filed November 7, 1985, and the jurisdiction of the Supreme Court is invoked under §28 U.S.C. 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1254(1), Title 28 U.S.C. reads as follows:

"§1254 Courts of Appeals; certiorari; appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;..."

Section 1951, Title 18 U.S.C. reads as follows:

"(a) Whoever in any way or degree obstructs, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of

a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section--

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate of future, to his person or property, or property in his custody or possesion, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45."

Section 371, Title 18 U.S.C. reads as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any

manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdeameanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701."

Section 2, Title 18 U.S.C. reads as follows:

"(a) Whoever commits an offense against the Unites States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever wilfully causes an act to be done which is directly performed by him or another would be an offense against the United States, is punishable as a principal."

The Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without compensation."

The Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trail, by an impartial jury of the state and district where the

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 1 of the Fourteenth Amendment to the Constitution of the United States:

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Clifford Brantley, then Sheriff of Jasper County, South Carolina, and Henry E. Ingram, Jr., a Hilton Head businessman who held no public office, were indicted in a two count indictment filed March 21, 1984. The first count alleged a conspiracy "to knowingly and willfully obstruct, delay and affect commerce as defined by Section 1951(b)(3) of Title 18 of the United States Code and did attempt so to do, by means of extortion, in violation of Title 18, United States Code, Section 1951." The second count alleged a substantive violation of the same Hobbs Act. The essence of the allegations was that Ingram and Brantley conspired together and that Brantley, abetted by Ingram, extorted a total of $2,300.00 in cash from Theodore Domine, an undercover FBI agent, posing as a wealthy entrepreneur from Cleveland, Ohio. Domine, who went by the name Ted Spinoso during the undercover investigation, told Ingram and Brantley that he

wanted to run a large-stakes gambling operation in Jasper County. The indictment alleged that Domine paid Brantley so that Brantley would allow the gambling enterprise to operate in his county.

Count two further alleged that "...Brantley, aided and abetted by the defendant Henry E. Ingram, Jr., knowingly and willfully did obstruct, delay and affect commerce as defined by Section 1951(b)(3) of Title 18 of the United States Code, and did attempt to obstruct, delay and affect commerce by means of extortion." The commerce alleged to have been obstructed was the gambling enterprise established by Domine and the interstate connection alleged in the indictment was that the gambling operation involved the sale of liquor and use of equipment manufactured outside the state of South Carolina with participants from outside the state of South Carolina.

Both Brantley and Ingram were tried by a jury drawn from a statewide pool of jurors over objections from trial coun-

sel rather than from the pool of jurors within the Charleston Division where the crimes allegedly occurred and where the court normally convened.

At the end of the trial on May 18, 1984, both defendants were convicted of the conspiracy and substantive counts, Brantley receiving a sentence of five years and a fine of $2,200.00 on count one and a sentence of seven years on count two, the sentence to run concurrently, and Ingram receiving concurrent sentences of four years on each count.

The case was appealed to the fourth circuit which found that the government's evidence at trial was that the FBI moved its own gambling equipment from Virginia to South Carolina and had its agents pretend to gamble and to purchase whiskey. Because there were no commercial transactions, the entire operation was merely a pretense not affecting interstate commerce. Since the jurisdictional predicate was not satisfied, the fourth circuit reversed the conviction for the substantive

offenses but sustained the convictions on the conspiracy count.

Petitioner hereby seeks certiorari through this petition.

REASONS FOR GRANTING WRIT

I

Certiorari Should Be Granted To Resolve Conflicts Among The Lower Courts

The validity of the doctrine of "impossibility" contained in the law of criminal attempt has been referred to by this court in *Osborn v. United States*, 385 U.S. 323, 333, 17 L.Ed.2d 394, 87 S.Ct. 429 (1966), but no decision has yet been rendered to resolve major conflicts among the lower courts.

In addition to the lack of uniformity among different jurisdictions, there appear to be as many differing opinions from scholars on the law of attempt which one court said ". . . has provoked a vast amount of discussion,

more or less learned." *United States v. Darnell,* 545 F.2d 595, 597 (8th Cir. 1976) (footnote omitted), *cert. denied,* 429 U.S. 1104, 51 L.Ed.2d 556, 97 S.Ct. 1134 (1977).

Numerous courts have voiced the same message as the *Darnell* court did at 598 when it said "[t]he problem cries for legislative solution. Until it comes the issue lurks in a semantic swamp." See *United States v. Hair,* 356 F.Supp. 339, 342 (D.D.C. 1978); *People v. Rollino,* 37 Misc. 2d 14, 18-19, 22, 233 N.Y.S. 2d 580, 584-86 (1962); *Booth v. State,* 398 P.2d 863, 872 (Okl. Cr. App. 1964).

Proponents of the Model Penal Code proposed a revision of the federal criminal code which would have eliminated legal impossibility as a defense to an attempt charge as early as 1960. Tentative Draft No. 10, at 323 (1960), and the National Commission on Reform of Federal Criminal Laws has proposed a general attempt statute, applicable to every federal offense. Working Papers of the National Commission on Reform of

Federal Criminal Laws, Vol. 1, 360, (1970).

In spite of this hue and cry, Congress has not yet seen fit to eliminate legal impossibility as a defense to an attempt or conspiracy to violate the Hobbs Act, 18 U.S.C. §1951.

The circuit courts have reacted differently in allowing the defense of legal impossibility to be used by defendants in prosecution under the Hobbs Act.

The fourth circuit case of *Ventimiglia v. United States,* 242 F.2d 620 (1957) has been frequently cited by other courts in other circuits to explain the distinction between "legal" and "factual" impossibility. The fourth circuit held in that case that there can be no conspiracy to commit a crime when it is legally impossible to commit the underlying substantive offense. The lower court did not mention *Ventimiglia,* which was not a case involving the Hobbs Act, in the opinion in the case at bar; rather the court below found that the approach of the Model Penal Code

§ 5.01(1)(a) (not yet adopted by Congress) would apply to the petitioner herein, *i.e.*, if the true facts had been as the defendants believed them to have been, commerce would clearly have been affected (App.54).

The court cited the discussion in *United States v. Brooklier*, 459 F.Supp. 476, 479-82 (C.D.Cal. 1978), a Hobbs Act case, as apparent support for the reasoning that the defendants had no defense since the mistake was one of fact and not one of law. Presumably the fourth circuit would still afford some defendants charged with conspiracy the right to present a legal impossibility defense if the fact situation was characterized as a mistake of law.

Such is not the situation in the ninth circuit which has totally rejected legal impossibility as a defense to a charge of conspiracy to commit any offense against the United States, characterizing it in one case as "nonsense." *United States v. Stanford*, 547 F.2d 1085 (1976); *United States v. Bagnariol*, 665 F.2d 877, *cert. denied*,

456 U.S. 962, 72 L.Ed. 2d 487, 102 S.Ct. 2040 (1981); *United States v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223 (1982); *United States v. Everett*, 692 F.2d 596, *cert. denied*, 460 U.S. 1051, 75 L.Ed.2d 930, 103 S.Ct. 1498 (1982). However, the ninth circuit has preserved legal impossibility as a defense to a charge of attempt, *Everett, supra*, by requiring, as the fifth circuit does, objective acts to unequivocally corroborate the necessary criminal intent, thereby minimizing possible erroneous official conclusions about a defendant's guilty mind.

Whether the test which the fifth circuit set out in *United States v. Oviedo*, 525 F.2d 881, 885 (1976) of objective acts performed by a defendant to corroborate criminal intent would apply in a conspiracy case is not clear since Oviedo was charged with an attempt to distribute heroin where the supposed heroin was in fact a non-controlled substance. The *Oviedo* court did not find the factual and legal impossibility definitions helpful, and after dis-

cussing how the second and third circuits had dealt with two attempt cases, the fifth circuit court used its objective basis to determine that the evidence was insufficient to determine criminal intent. Because the fifth circuit in the earlier conspiracy case of *United States v. Hunter,* 478 F.2d 1019 (1973) discussed merger of an attempt with the completed crime, there is no reason to believe that the fifth circuit would treat a legal impossibility defense in a conspiracy case any differently than it did in *Oviedo, supra.*

The third circuit in *United States v. Berrigan,* 482 F.2d 171, 186 (1973), a case involving attempting to smuggle letters in and out of a federal prison, takes the position that ". . . conduct intended to be prohibited by federal law must be explicitly prohibited by statutory authority." The court then holds that ". . . attempting to do that which is not a crime is not attempting to commit a crime," citing *United States v. Hair, supra.* In *United States v. Jannotti,* 675 F.2d 578, 592 (3rd Cir.

1982) the court, in a Hobbs Act conspiracy case, recognized the legal impossibility defense but rejected it because it found that there existed the requisite nexus to interstate commerce and the defense was not applicable.

The third circuit in a recent case discussed the intent of Congress in eliminating the impossibility defense where drug laws were involved and found that the intent expressed by Congress would govern the court's interpretation. "Unlike *Berrigan*, this case involves a statute by which Congress intended to punish attempts even when completion of the attempted crime was impossible." *United States v. George Everett*, 700 F.2d 900 (3rd Cir. 1983).

The seventh circuit in *United States v. Mattson*, 671 F.2d 1020 (1982) came to exactly the opposite conclusion as the fourth circuit did in the case at bar. When the seventh circuit found that the alleged conspiracy did not in of itself affect interstate commerce, the court found no federal jurisdiction

and would not permit the convictions to stand. *Mattson, supra* at 1025.

While the seventh circuit did not discuss *Mattson* in terms of the legal impossibility defense, it is obvious that the court's analysis encompassed this defense.

The first and second circuits are in basic agreement concerning attempts and conspiracies with §5.01(1) of the Model Penal Code which provides that a person is guilty of an attempt "if acting with the kind of culpability otherwise required for commission of the crime he [sic]: (a) purposely engaged in conduct which would constitute the crime if the attendant circumstances were as he [sic] believes them to be." Model Penal Code §5.01 (proposed official draft May 4, 1962). *United States v. Waldron,* 590 F. 2d 33 (1st Cir. 1979); *United States v. Heng Awkak Roman,* 356 F. Supp. 434 (S.D.N.Y. 1973) *aff'd* 484 F. 2d 1271 (2nd Cir. 1973); *United States v. Marin,* 513 F. 2d 974 (2nd Cir. 1974).

The eighth circuit, in determining whether the legal impossibility defense was available in an attempted extortion under the Hobbs Act, discussed the distinction between factual and legal impossibility in *United States v. Frazier*, 560 F.2d 884, 888 (1977) and rejected Frazier's assertion because the situation fell into the factual impossibility category. The eighth circuit's earlier discussion of the defense in *United States v. Darnell*, *supra*, indicates that the court would treat conspiracies in the same manner as other attempts by making a determination of whether the situation claimed was a factual or legal impossibility. Obviously, this circuit recognizes the defense, but as in other lower courts, the applicability is difficult and confusing.

The eleventh circuit briefly discussed factual impossibility in a Hobbs Act conspiracy and attempt case, but then cited an eleventh and a ninth circuit case not involving the impossibility defense, and *Jannotti*, *supra*, without giving a clear indication of

whether or not the legal impossibility defense might be valid in another factual situation. *United States v. Holmes*, 767 F. 2d 820, 824 (11th Cir. 1985).

The tenth circuit and the sixth circuit have apparently not ventured into this complicated area of the law, but as seen by the cited cases, the conflict is so substantial that had the petitioner before the Court been charged with the same offense in the seventh circuit's jurisdiction, then his remaining conviction would have been reversed. This denial of equal protection needs to be addressed by the Court, not only for the petitioner's sake, but to resolve the treatment of this defense of legal impossibility by the lower courts.

II, III and IV

Certiorari Should Be Granted Because The Decision of the Fourth Circuit Court of Appeals Is Not In

Accord With Applicable Decisions Of This Court.

II

The fourth circuit in the case at bar said, "[t]he defendants were the victims of false pretense, and the falsity induced the erroneous assumption. In those circumstances, what the defendants may have believed is too fragile a connection with commerce to supply the jurisdictional predicate for conviction upon the substantive charge of obstruction by extortionate means." App.

* * *

"It was wholly unnecessary for the FBI to move gambling equipment from Virginia to South Carolina; or to have it agents pretend to gamble and to purchase whiskey. We do not think the commercial predicate for federal jurisdiction can be found in such pretence on the part of federal agents." App.49,50.

The lower court then found that even though there was no federal jurisdiction for the substantive court alleging a Hobbs Act violation, the conviction of conspiracy to violate the same Act would stand.

As stated previously, the seventh circuit reached exactly the opposite result in *Mattson, supra,* at 1025:

"This argument, however, overlooks the point that the alleged conspiracy to extract money from Anderson did not in and of itself affect interstate commerce."

* * *

"The Hobbs Act requires that interestate commerce be affected by extortion, not by a result of extortion; there must be a nexus between extortion and interstate commerce before federal jurisdiction is present."

The court then reversed the conviction due to a lack of federal jurisdiction.

This Court stated quite clearly in *United States v. Feola,* 420 U.S. 671,

695, 696, 43 L.Ed.2d 541, 559, 95 S. Ct. 1255 (1975) that the operative fact investing federal jurisdiction, regardless of the defendant's perception, was the victim's status as a federal officer:

"...The jurisdictional requirement is satisfied by the existence of facts tying the proscribed conduct to the area of federal concern delineated by the statute. Federal jurisdiction always exists where the substantive offense is committed in the manner therein described, that is, when a federal officer is attacked. Where, however, there is an unfulfilled agreement to assault, it must be established whether the agreement, standing alone, constituted a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction. If the agreement calls for an attack on an individual specifically identified, either by name or by some unique characteristic, as the putative buyers in the present case, and that specifically identified individual is in fact a federal officer, the agreement may be fairly characterized as one calling for an assault upon a federal officer, even though the parties were unaware of the victim's actual identity and even though they would not have agreed to the assault had they known that identity.

Where the object of the intended attack is not identified with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer, it is impossible to assert that the mere act of agreement to assault poses a sufficient threat to federal personnel and functions so as to give rise to federal jurisdiction. [Emphasis added.]

Where there is not even a probable effect on interstate commerce, how has the government carried its burden to prove federal jurisdiction?

United States v. Staszcuk, 517 F. 2d 53, 59, 60 (7th Cir.) *(en banc)*, *cert. denied*, 423 U.S. 837, 96 S. Ct. 65, 46 L. Ed. 2d 56 (1975) cited by the fourth circuit in its opinion held "...that the commerce element of a Hobbs Act violation--the federal jurisdictional fact--may be satisfied...by showing a realistic probability that an extortionate transaction will have some effect on interstate commerce." (Footnote omitted.) The *Staszcuk* court at 59 emphasized that the prosecutor was required in every Hobbs Act case "to

prove *some* connection with interstate commerce...." (Emphasis added.)

By not requiring this proof in the case before the court, the fourth circuit has departed from the law as interpreted by this Court and other lower courts.

III

The Sixth Amendment provides an accused the right to a jury trial "...in the state and district where the crime shall have been committed which district shall have been previously ascertained by law...."

The purpose of the Jury Selection and Service Act of 1968 can be found in section 1861, 28 U.S., which states:

"It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes ...." As amended March 27, 1968

The definition of "division" in §1869 Title 28 U.S.C. is:

"(1) one or more statutory divisions of a judicial district; or (2) in statutory divisions that contain more than one place of holding court, or in judicial districts where there are no statutory divisions, such counties, parishes, or similar political subdivisions surrounding the places where court is held as the district court plan shall determine: Provided, That each county, parish, or similar political subdivision shall be included in some such division."

Several courts have discussed the requirements of the Jury Selection and Service Act relating to arbitrary enforcement of court plans and constitutional mandates pertaining to a cross-section of the community drawn from a division. *Dupoint v. United States*, 388 F. 2d 39 (5th Cir. 1968); *United States v.*

Truglio, 731 F.2d 1123 (4th Cir. 1984); *United States v. Fernandez* 480 F. 2d 726, 734 (2nd Cir. 1973).

Before the trial of the petitioner began, the chief judge of the district court of South Carolina, apparently *sue sponte*, issued an order that the jury for the trial of petitioner's case be drawn from a statewide jury box, rather than from a divisional jury box, namely the Charleston Division box, in which division the defendants resided and in which the crime was alleged to have taken place.

Trial counsel objected to this procedure and produced evidence that indicated a substantial reduction of non-white qualified jurors in the statewide jury panel versus the Charleston Division panel. Both the trial judge and the fourth circuit found no merit in petitioner's motion to have the jury drawn from the Charleston Division.

The Sixth Amendment could not be much clearer in spelling out exactly what the government must do when selecting a jury.

This Court, in a long line of cases, has assumed that juries will be representative of the community of the accused, *Smith v. Texas*, 311 U.S. 128, 85 L. Ed. 84, 61 S. Ct. 164 (1940); reasonably reflect a cross-section of the population, *Brown v. Allen*, 344 U.S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953); *Carter v. Greene County*, 396 U.S. 320, 24 L. Ed. 2d 549, 90 S. Ct. 518 (1970); *Taylor v. Louisiana*, 419 U.S. 522, 42 L. Ed. 2d 690, 95 S. Ct. 692 (1975); *Duren v. Missouri*, 439 U.S. 357, 58 L. Ed. 2d 579, 99 S. Ct. 664 (1979).

Also, this Court has said that a criminal defendant of any race has standing to challenge the jury selection process as unconstitutionally excluding Negroes upon denial of due process grounds, *Peters v. Kiff*, 407 U.S. 493, 33 L. Ed. 2d 83, 92 S. Ct. 2163 (1972).

Petitioner would urge the Court to correct the denial of his Sixth Amendment rights.

IV

While the fourth circuit stated that there was insufficient evidence to charge entrapment in the case at bar, that decision does not conform to the fourth circuit's holding in *United States v. Perl*, 584 F. 2d 1316, 1321 (1978) and earlier fourth circuit cases; nor is the ruling of the lower court in accord with decisions of this Court involving entrapment.

This Court first recognized the defense of entrapment in *Sorrells v. United States*, 287 U.S. 435, 448, 77 L. Ed. 413, 53 S. Ct. 210 (1932) when Chief Justice Hughes wrote:

"We are unable to conclude that it was the intention of the Congress in enacting [a criminal] statute that its processes of detection and enforcement should be abused by the instigation *by government officials* of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."

The *Sorrells* Court was sharply

divided over whether the issue was a matter for the jury or the court, and when the Court considered the defense again twenty-five years later in *Sherman v. United States*, 356 U.S. 369, 377 2 L.Ed.2d 848, 78 S. Ct. 819 (1958), the nature of the defense was further explained. The majority, speaking through the Chief Justice, found entrapment as a matter of law and noted that the circuit courts, when presented with this issue, had, since *Sorrells*, unanimously concluded that "unless decided as a matter of law, the issue of whether a defendant has been entrapped is for the jury."

The 5 to 4 decision in *U.S. v. Russell*, 411 U.S. 423, 426 36 L. Ed. 2d 366, 93 S. Ct. 1637 (1973) upholding the conviction said that creative involvement by government agents is not a defense which may be asserted by a predisposed defendant as a matter of law and let stand the jury's decision after a charge by the trial judge which instructed the jury to acquit the defendant if a reasonable doubt existed as to

"...whether the defendant had the previous intent or purpose to commit the offense...and did so only because he was induced or persuaded by some officer or agent of the government."

By a 5 to 3 decision, this Court in *Hampton v. United States*, 425 U.S. 484, 48 L. Ed. 2d 113, 96 S. Ct. 1648 (1976), ruled that the entrapment defense did not apply as a matter of law, and the trial judge was correct in not giving a charge to the jury based upon the facts before the Court.

In the case at bar, the petitioner took the stand and admitted some of the allegations explaining that he did not understand why those actions were against the law and if his testimony were taken as the truth, he established an entrapment defense. After the trial judge refused to charge the jury on entrapment and after the jury had deliberated for approximately an hour, the jury returned to the courtroom and the following exchange occurred:

JUROR: May I ask one question of the Court, sir?

THE COURT: All right, sir.

JUROR: Pertaining to our procedure?

THE COURT: Yes, sir.

JUROR: It's come to the forefront in there, possibility of entrapment in this proceeding. Is that to be considered in any way?

THE COURT: No, sir, entrapment is not an element for you to consider.

JUROR: Thank you.

(Jury Excused.)

The fourth circuit in *Perl, supra,* at 1321, simply held that "...in order to assert the defense of entrapment in a federal prosecution, [a defendant] must produce evidence of government involvement in the scheme to entrap."

The petitioner contends that this is a reasonable requirement and once the scheme of the government agent is established, then the burden would shift to the government to convince the jury beyond a reasonable doubt that there was no entrapment using the *Sorrells* formula.

Certainly in petitioner's case, he produced evidence through inconsistencies in the FBI agent's testimony that supported his version of what happened, so much so that the jury thought there was an issue as to entrapment, even though no charge had been given.

In these days of frequent use of FBI agents as *agent provocateurs*, Judge Aldisert's remarks are the most persuasive argument petitioner can find to beseech this Court to grant his petition.

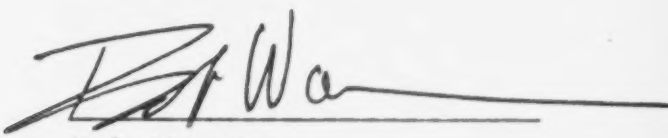
> "Popular opinion may not care greatly about the fates of those entrapped and convicted by the government and its *agents provocateur*, but federal judges must care about the sword that is plunged into the body of trust between a people and their government. That body can withstand only so many wounds before its life will be no more."

United States v. Jannotti, *supra* at 623 (Aldisert, J. dissenting)

CONCLUSION

For the foregoing reasons, petitioner asks that this petition for writ of certiorari be granted.

May 29, 1986 Respectfully submitted,



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COUNSEL FOR PETITIONER

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5233

United States of America,

Appellee,

versus

Clifford Brantley,

Appellant.

No. 84-5234

United States of America,

Appellee,

versus

Henry E. Ingram, Jr.,

Appellant.

No. 84-6674

United States of America,

Appellee,

versus

Clifford Brantley and
Henry E. Ingram, Jr.,

Appellants.

Appeal from the United States District Court for the District of South Carolina, at Columbia. William W. Wilkins, Jr., District Judge. CR 84-56

Argued March 5, 1985

Decided November 7, 1985

Before HALL and MURNAGHAN, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge

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Robert B. Wallace; Glenn B. Hester (Paul E. Tinkler; Wallace and Wallace; J. Robert cooper; Law Offices of J. Robert Cooper of brief) for Appellant; John McIntosh, Assistant United States Attorney (Dale L. Dutremble, Assistant United States Attorney; Henry Dargan McMaster, United States Attorney; John R. McGravy, III, Third Year Law Student on brief) for Appellee.

HAYNSWORTH, Senior Circuit Judge:

The defendants were convicted of extortion in violation of the Hobbs Act, and of conspiracy to commit extortion in violation of that statute. Since the only claimed actual effect upon interstate commerce was pretensive activity by FBI agents, we reverse the convictions of the substantive offenses but affirm the convictions on the conspiracy count.

I.

An FBI agent named Domine was sent from Cleveland, Ohio to investigate, in an undercover capacity, a report of corruption on the part of a state magistrate on Hilton Head Island, South Carolina. He pretended to be interested in opening and operating a gambling den, for which he would need some protection from law enforcement officials. He met the defendant Ingram who, among other things, owned and placed gambling devices known as poker machines. They discussed the possibility of Domine renting a vacant restaurant on Hilton Head Island and of insulating an illegal

gambling operation from intrustion by law enforcement officials. It turned out that the vacant restaurant was unavailable on a short term basis, but Ingram, who had grown up in Jasper County, South Carolina and sometimes dabbled in real estate, told Domine of a vacant restaurant in Hardeeville, Jasper County, South Carolina, which he thought appropriate for Domine's purpose. Brantley, the sheriff of Jasper County, was a friend of Ingram's, and Ingram assured Domine that Brantley would protect the illegal gambling operation if paid $500 a month. Ingram also suggested that Domine give Brantley $200 during the first meeting to demonstrate his good intentions about later payments.

Domine and Ingram visited Brantley in his office in Ridgeland, the county seat of rural Jasper County. Domine explained his intention to rent the restaurant building and, once a month, bring in people from such cities as Cleveland, New York and Chicago for gambling at very high stakes. Brantley

expressed approval of the proposal, though he insisted that local people not be involved. At the conclusion of the meeting, Ingram gave the sheriff $200 which Domine had provided for that purpose.

Domine rented the building on a monthly basis. Gambling tables and equipment were brought down from the FBI training academy in Quantico, Virginia and installed in the club. Thereafter, once a month for the next four months, six to eight FBI agents were assembled at the club. They gambled, but with money supplied by the FBI. They consumed alcoholic beverages that had been provided by the FBI, and they "paid" for their drinks with money furnished by the FBI.*

In each of those four months,

* *The liquor at the bar was in large bottles. In South Carolina, licensed restaurants and lounges may sell alcoholic beverages for consumption on the premises, but only in mini-bottlee, such as those used on the airlines. This "club" was unlicensed.*

Domine met with Sheriff Brantley. He told the sheriff that he was operating the gambling casino as he had planned and, each time, gave the sheriff $500. On more than one of those occasions, the sheriff stated that it was unnecessary for Domine to pay him anything, or that Domine owed him nothing, but he accepted the money on each occasion.

II.

Though what was done at the club was blatant sham, the government contends that it supplied the necessary effect upon commerce. The gambling equipment had been transported from Virginia. The whiskey had moved in interstate commerce for there is no licensed distillery in South Carolina. Some of the agents may have come from other states.

These, however, were not commercial transactions. The FBI transported its own gambling devices from Virginia to South Carolina, but they were not the subjects of commercial transactions. The whiskey had moved in interstate com-

merce, but the FBI made no commercial use of it. It simply provided the assembled agents with free drinks. If the FBI's use of the whiskey had been reasonably necessary or appropriate, its previous movement in interstate commerce may well have supplied the jurisdictional effect upon commerce, but such an effect may not be found in pretense and contrivance. If some of the assembled agents came from other states, that was of no moment. See *Rewis v. United States*, 401 U.S. 808, 811-12 (1971). The fact is that nothing ever happened at the club except pretense.

One violates the Hobbs Act, 18 U.S.C.A. § 1951, when he "obstructs, delays, or affects commerce...[by] extortion," and, by definition, the commerce affected must be interstate commerce or commerce with or within the District of Columbia or a United States territory or possession. *Id*. at § 1951(b)(3). The jurisdictional predicate may be satisfied though the impact upon commerce is small, and it may be shown by proof of probabilities without

evidence that any particular commercial movements were affected. Thus, in *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978), it appeared that the FBI had set up a corporation to solicit business cleaning public buildings in Baltimore, Maryland where corruption was suspected. The cleaning corporation actually received a contract to clean a public building, and, as required by the contract, it purchased and used a cleaning compound manufactured in Pennsylvania. It also leased and brought into the state scaffolding necessary for the work. Use of the cleaning compound and the scaffolding were held enough to satisfy the commerce requirement. *Id.* at 671.

In *United States v. Spagnolo*, 546 F.2d 1117 (4th Cir. 1976), we held that an effect upon commerce could be proven by proof of probabilities. There a co-owner of a construction firm had been forced at gunpoint to sell his half interest in the business. His removal as an officer of the business was held to have had such a probable effect on interstate commerce that the jurisdic-

tional predicate was satisfied, though there was no attempt to prove that identified shipments in commerce were affected. *Id.* at 1119.

In those cases, however, there was a strong element of reality in the commercial aspect of the activity. In *Santoni*, the contract required the purchase and use of a cleaning compound manufactured in Pennsylvania, and the necessary scaffolding was actually procured out of state. In *Spagnolo*, it was highly probable that the withdrawal of the "financial source" of the construction company would affect commerce in countless ways, for the effect of the conduct of such a business on commerce varies with the volume and nature of the construction work. There is nothing in those cases, however, to suggest that the necessary commercial connection may be shown by producing a child of fantasy.

It may be enough that the parties intended to complete a transaction which would have affected commerce, though their intention was frustrated. In *United States v. Staszcuk*, 517 F.2d 53

(7th Cir.) *(en banc)*, *cert. denied*, 423 U.S. 837 (1975), with the help of a bribe of a city councilman, a zoning change was procured to permit the erection and operation of an animal hospital. Later, after obtaining bids on the construction, the owner concluded that construction of an animal hospital was not feasible, and the land was put to a use permitted by the earlier zoning. It was held that it was enough that commerce would have been affected if the project had been carried through to conclusion as contemplated when the zoning change was effected. In that case, of course, there was nothing pretensive about the representation of the owner; he simply had underestimated his projected costs when he procured the zoning change. That case does not suggest that the requisite effect upon commerce may be found in pretense.

The Hobbs Act proscribes inchoate offenses as well as actual obstructions of commerce. When we come to the convictions on the conspiracy count, the perspective will not be the same, but we do not think the convictions of the

substantive offenses may be sustained on the basis of the defendant's mistaken assumption that commerce would be affected. The defendants were the victims of false pretense, and the falsity induced the erroneous assumption. In those circumstances, what the defendants may have believed is too fragile a connection with commerce to supply the jurisdictional predicate for conviction upon the substantive charge of obstruction by extortionate means.

We are influenced by another consideration: that federal agents may not manufacture jurisdiction by contrived or pretensive means. In *United States v. Archer*, 486 F.2d 670 (2d Cir. 1973), the Court of Appeals for the Second Circuit held that a violation of the Travel Act, 18 U.S.C.A. §1952, may not be shown when the jurisdictional predicate was an unnecessary interstate telephone call placed by one of the agents. The court held that when the jurisdictional predicate is based upon acts of undercover agents, the matter should be examined with greater than

ordinary care, and that contrived activity by such agents may not satisfy the requirement. *Id.* at 681-82; *c.f. United States v. Gambino*, 566 F.2d 414, 419 (2d Cir. 1977).

It was wholly unnecessary for the FBI to move gambling equipment from Virginia to South Carolina, or to have its agents pretend to gamble and to purchase whiskey. We do not think the commercial predicate for federal jurisdiction can be found in such pretense on the part of federal agents. Nor do we think the conviction for the substantive offenses may be sustained on any theory of the subjective intention of the defendants or the effect of their conduct on commerce if they themselves had not been the victims of false representations and the club had been opened and operated as the undercover agent had represented.

III.

The defendants were also convicted of conspiracy to violate the Hobbs Act, and in those convictions we perceive no

infirmity. The statute not only proscribes extortion affecting commerce; it expressly extends its prohibition to one who attempts or conspires to affect commerce by extortionate means. 28 U.S.C.A. § 1951(a).

As with other conspiracies, a conviction of conspiring to obstruct commerce in violation of the Hobbs Act may be founded upon proof of an agreement to engage in conduct which would violate the statute. Though proof of some overt act in furtherance of the conspiracy may be required, proof that its purpose was accomplished is not. Unlawful conspiracies may be frustrated or aborted for a variety of reasons, including the intervention of law enforcement officials before the unlawful purpose is accomaccomplished. Failure of its purpose, however, can never legitimate an unlawful conspiracy to commit a crime. Thus it was held in *Ladner v. United States*, 168 F.2d 771, 773 (5th Cir. 1948), that the defendants were properly convicted of conspiring to violate the predecessor of the Hobbs Act though the victim

refused to pay the toll. See *e.g. United States v. Jannotti*, 673 F.2d 578 (3d Cir.), *(en banc), cert. denied*, 457 U.S. 1106 (1982), subsequent appeal, 729 F.2d 213 (3d Cir.), *cert. denied* 105 S.Ct. 243 (1984); *United States v. Brooklier*, 459 F. Supp. 476 (C.D. Cal. 1978).

In *Jannotti*, it appeared that undercover agents purporting to represent a fictious Arab sheik represented to influential members of Philadelphia's city council that the sheik proposed to build a hotel of substantial size in Philadelphia, but that he would make no commitment to the project unless he had in advance satisfactory assurance that he would encounter no problem in obtaining necessary zoning variances and automobile traffic re-routing and would not be hindered or delayed by unreasonable enforcement of building codes or regulations. The councilmen gave such assurances and accepted substantial payments in exchange for them.

Though the sheik and the proposed hotel were entirely fictitious, the

majority of the *en banc* court held that the necessary effect upon commerce had been shown. The majority disclaimed a holding that the commercial connection could be found in the subjective intentions of the defendants that commerce be affected but, drawing on *Staszcuk*, concluded that "the defendants' conduct constituted a sufficient threat to interstate commerce so as to implicate an 'area of federal concern' sufficient to give rise to federal jurisdiction." 673 F.2d at 592.

In *Brooklier*, 459 F. Supp. 476 (C.D. Cal. 1978), it appeared that the FBI had set up a shell corporation which purported to be engaged in the exportation of pornographic films to Mexico and South America. The indictment alleged that the defendants demanded and obtained $6,500, believing the victim to be a private corporation engaged in an illegal enterprise. The indictment charged them with an attempt to violate the Hobbs Act. The court denied a motion to dismiss and, in a comprehensive opinion, held that the defendants could be

convicted of the attempt charge if the allegations of the indictment were proven. Commerce would have been affected if the facts had been as the defendants believed them to have been, and the fact that an effect upon commerce was impossible in light of the true facts was no defense, since the defendants' misapprehension was a mistake of fact and not one of law. *Id.* at 479-82.

Upon a charge of a conspiracy or an attempt to violate the Hobbs Act, it is simply irrelevant that, because of facts unknown to the conspirators or to the actor, an actual effect upon commerce was impossible.

This is consistent with the general rule applicable to inchoate offenses. Though the circumstances may be misapprehended, if one "purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be," the actor is guilty of a criminal attempt. Model Penal Code, § 5.01(1)(a). The same principle is applicable when two or more persons conspire to engage in the conduct. The

facts may be taken to be as the conspirators believed them to be.

In this case, there was abundant proof that Brantley and Ingram entered into a conspiratorial agreement to violate the Hobbs Act. Brantley accepted the initial extortionate payment from Ingram and subsequent ones from Domine. If the true facts had been as they believed them to have been, commerce would clearly have been affected.

This was not the case of a local enterprise that might now and then have been patronized by residents of other states. The scheme as described to the defendants was to bring down people from large northern cities for high stakes gambling. Patronage of non-residents was to be sought, while local people were to be excluded from participation. Such an operation would have been the cause of interstate travel by many, if not all, of the patrons of the establishment. See *Rewis v. United States*, 401 U.S. 808, 813-14 (1971). That travel would have had an impact upon public transportation facilities and local

hostelers. It would have occasioned the local consumption of food and drink, some of which would have moved in interstate commerce. The conduct in which the conspirators thought they were engaged would have had more than an adequate effect upon commerce to constitute a violation of the Hobbs Act. Brantley and Ingram were the victims of pretense in the description of the project, but that does not sanitize their purpose or their willing participation in a conspiracy to violate the Hobbs Act.

IV.

We find no merit in any of the other contentions of the appellants.

There was insufficient evidence of entrapment to warrant an instruction on the subject, and we perceive no error in any of the rulings of the district judge during the trial or in the denial of the motion for a new trail.

V.

For these reasons, the convictions on the substantive count are reversed while

those on the conspiracy count are affirmed.

AFFIRMED IN PART;
REVERSED IN PART.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-5233

United States of America,

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No. 84-5234

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Henry E. Ingram, Jr.,

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No. 84-6674

United States of America,

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Clifford Brantley and
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Appellants.

Appeal from the United States District Court for the District of South Carolina, at Columbia. William W. Wilkins, Jr., District Judge. CR 84-56

Filed April 2, 1986

Upon consideration of the appellants' petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Haynsworth for a panel consisting of Judge Hall, Judge Murnaghan and Judge Haynsworth.

For the Court,

John M. Greachen
Clerk